IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

RSA.No. 671 of 2006(E)

AS.49/1999 of III ADDL. DISTRICT COURT, KOLLAM
OS.773/1996 of PRL.MUNSIFF'S COURT, KOLLAM

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APPELLANT/SECOND RESPONDENT/SECOND DEFENDANT:

SANTHOSH KUMAR, NADAYIL KIZHAKKATHIL
(LAKSHMI SADANAM), MULANKADAKOM WARD,
PUNNATHALA CHERRY, KOLLAM WEST VILLAGE.

BY ADV. SRI.P.B. SURESH KUMAR

RESPONDENTS/APPELLANT & RESPONDENTS NOS.1,3,4,5 & 6/PLAINTIFF AND DEFENDANTS NOS. 1, 3, 4, 5 & 6:

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1. BABY ALIAS CHANDRAVALLI,
D/O.LAKSHMIKUTTY, RESIDING AT NADAYIL
KIZHAKKATHIL, (LAKSHMI SADANAM) MULANKADAKOM WARD,
PUNNATHALA CHERRY, KOLLAM WEST VILLAGE.

*2. LAKSHMIKUTTY, D/O. KALYANI,
RESIDING AT NADAYIL KIZHAKKATHIL
(LAKSHMI SADANAM), MULANKADAKOM WARD,
PUNNATHALA CHERRY, KOLLAM WEST VILLAGE.
(*DELETED.)

3. VASANTHA LEKSHMI, D/O.LAKSHMIKUTTY
RESIDING AT NADAYIL KIZHAKKATHIL
(LAKSHMI SADANAM), MULANKADAKOM WARD
PUNNATHALA CHERRY, KOLLAM WEST VILLAGE.

4. INDIRA, D/O. LEKSHMIKUTTY,
RESIDING AT THUMBAVILAKOM, MEENAMKULAM,
CHITTATHUMUKKU P.O., FROM NADAYIL KIZHAKKATHIL,
MULANKADAKOM WARD.

5. VALSALA, D/O. LEKSHMIKUTTY,
RESIDING AT MADHAVA MANDIRAM,
PATTATHANAM, KOLLAM.

6. MURALEEDHARAN PAI,
DOCUMENT WRITER, LICENCE NO.550,
VALLIATHU MADOM, MULANKADAKOM.

(*RESPONDENT NO.2 DELETED FROM THE PARTY ARRAY AT THE RISK OF THE PETITIONER VIDE ORDER DATED 23.11.2006 IN I.A. 2562 OF 2006)

BY ADV. SRI.K.S.MANU (PUNUKKONNOOR)
ADV. SRI.P.SREEKUMAR

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 18/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

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R.S.A.No. 671 OF 2006

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Dated this the 18th December , 2006

J U D G M E N T

The first respondent filed the suit for partition claiming ½ share in the plaint schedule property . According to the plaintiff , the property belonged to Chellappan Achari, father of the plaintiff and defendants Nos. 2 to 5 and the husband of the first defendant . Chellappan Achari died on 29.10.1978. The plaintiff has 1/6th share in the property. She purchased the shares of defendants Nos. 4 and 5. Thus she claims ½ share in the property.

2. Defendants Nos. 1 and 2 contested the suit. They contended that the property did not belong to Chellappan Achari, but it belongs to first defendant .

3. The trial court held that the plaintiff has 1/6th share in the property and she having purchased 2/6 share of defendants Nos. 4 and 5, is entitled to ½ share in the property. The contention that the property was acquired by Chellappan Achari was accepted by the trial court . There

was a prayer for a declaration that the document executed by the first defendant in favour of the second defendant in respect of the property is not binding on the share of the plaintiff. The trial court granted that prayer.

4. The plaintiff raised a contention that the house in the plaint schedule property was renovated by her with her funds. The second defendant, on the other hand, contended that he spent huge amounts for renovation of the house . The second defendant claimed reservation of house in his favour. The trial court held that the second defendant renovated the building by spending his funds and that he is entitled to get reservation of the house. Though a prayer was made by the plaintiff for grant of a permanent prohibitory injunction restraining the defendants Nos. 1 to 3 from causing obstruction to the peaceful possession of the house by the plaintiff, that prayer was not granted by the trial court . The trial court took the view that the plaintiff can reside in the room which is now occupied by her till final decree proceedings are over and she has to surrender possession thereof to defendants Nos. 1 to 3 after the final decree proceedings.

5. Though the second defendant challenged the judgment and

decree of the trial court in A.S.No. 55 of 1999, that appeal was dismissed for default and the dismissal has become final. The plaintiff filed A.S.No. 49 of 1999 challenging that part of the judgment and decree of the trial court by which the house was directed to be allotted to the second defendant . The appellate court held, on a consideration of the evidence of the plaintiff and the second defendant, that there is no convincing evidence as to who effected improvements. It was also held that there is no evidence to prove that the improvements were effected by any of the sharers with the consent of the remaining co-sharers. It was held that the appellant/second defendant is not entitled to get allotment of the house in his favour without valuation. However, the question whether the second defendant is entitled to get allotment of the house in equity was directed to be considered in the final decree proceedings.

6. The appellant (2nd defendant) has raised a contention for the first time in the Second Appeal that in view of Section 23 of the Hindu Succession Act, the suit is not maintainable since the only son of Chellappan Achari has not sought partition of the property. Section 23 of the Hindu Succession Act reads as follows:

> *"23. Special provision respecting dwelling houses:- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.*
>
> *Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."*

Section 23 was omitted by the Hindu Succession Amendment Act of 2005 (Act 39 of 2005). The question whether the deletion of section 23 of the Hindu Succession Act is retroactive, was considered in **Narayanan vs. Meenakshi** (**2006(1) KLT 210)** and it was held as follows:

> *"15. The Hindu Succession Amendment Act, 2005, Act 39 of 2005, was enacted on the basis of the 174th report of the Law Commission. The representations made by the various women's organisations were considered by the Law Commission. Even at the time when the Hindu Succession Act, 1956 was enacted, women's organizations had voiced the grievance that though the 1956 Act made commendable inroads into the erstwhile Hindu system of inheritance, still the gender discrimination against women was not fully done away with by the 1956 Act. As per S. 4 of the*

> *Hindu Succession Amendment Act, 2005 (Act 39 of 2005), S. 23 of the Hindu Succession Act, 1956 is omitted. The question is whether the omission of S.23 of the Hindu Succession Act in view of the commencement of Act 39 of 2005 during the pendency of a suit for partition or an appeal or second appeal therefrom has relevance in deciding the question whether the male heir or male heirs could resist the suit for partition under section 23 of the Act. As held by the Supreme Court and this Court, the right to claim the benefit of S. 23 is personal to the male heir of the deceased Hindu intestate. Such a right is not heritable or alienable. Therefore, it cannot be said that cessation of such personal right during the pendency of a suit for partition would not entitle the female heir to claim partition taking note of the subsequent events. If the contention that the state of affairs as on the date of the suit alone would be relevant is to be accepted, then it would have the effect of indirectly holding that the personal right of the male heir to resist partition could be continued by his legal representatives, in case such male heir dies during the pendency of the suit. I have already held that the personal right of the male heir cannot be claimed by his legal heirs. Therefore, whenever the personal right of a male heir under S. 23 comes to an end, the right of the female heir to claim partition cannot be defeated. In other words, a defeasible right of a male heir would get defeated the moment his personal right ceases. Such personal right of a male heir is taken away by the omission of S. 23 of the Hindu Succession Act. 1956, by the Hindu Succession Amendment Act, 2005. The effect of such omission would be retroactive."*

In view of the decision in **Narayanan vs. Meenakshi ,** the contention of

the appellant that the plaintiff is not entitled to claim partition and that Section 23 of Hindu Succession Act is a bar to claim partition, cannot be sustained.

7. The plaint schedule property is having an extent of 14 cents. There is a house in the property. Even assuming that the second defendant had spent some amount for renovation of the house, he is not entitled to get reservation of the house in his favour. The second defendant has not proved that he has obtained express consent of the other sharers to make improvement. Moreover, improvement to an existing building is not a ground for claiming reservation of the entire house. At best, the second defendant could claim only an equitable consideration for the allotment of the house to his share after valuing the building. In **1972 KLT 861 (Kassinkunju vs. Velayudhan Pillai)**, the question whether a co-sharer can claim compensation for the improvements made in common property without the consent of other co-sharers was considered and it was held as follows:

> *"As pointed out by this court in **Mammathu vs. Kathijumma Umma (1965 KLT 655),** the law declines to compel a co-sharer to pay for improvements made on the common property by*

> *another co-sharer without the former's authorisation. However, as a matter of equity the court will make every effort to effect the division in such a way by allotting to the co-sharer who made the improvements the portion of the property where the improvements stand so long as this can be done consistently with the proportion of the property to which he is entitled and without causing prejudice to the other co-sharers. But any such equity will become incapable of being worked out in cases where the entire property to be partitioned has been either built upon or otherwise improved. In such cases where one joint tenant or tenant in common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding the fact that they may have added greatly to the value of the land".*

8. The property has to be divided into six shares. The second defendant has only 1/6 right. One co-sharer cannot build upon a common property in such a way as to defeat the legitimate rights of other co-sharers. When the extent of the property is small, such construction would make it impossible to partition the property in specie among all the co-sharers. The law does not recognise any such right in one co-sharer to make improvement in co-ownership property without express consent granted by other co-owners. The entitlement to get a share in a co-

ownership property is a very valuable right and it cannot be defeated by one co-owner by constructing a building in it without the consent of other co-owners. He cannot thereafter claim to allot the entire property including the building, without valuing the structure. Such unauthorised acts of a co-owner in a co-ownership property would defeat the rights of other co-sharers who have equal share in the property. The situation would be grave if the extent of the property is small. The court below was justified in rejecting the contentions put forward by the appellant/second defendant .

9. Learned counsel for the appellant also submitted that before the court below the counsel for the appellant reported no instruction and therefore the court below should have issued notice to the appellant before proceeding with the hearing of the appeal. The appeal was of the year 1999 and it was disposed of only in 2005. The appellant did not file an application for re-hearing or for review. To redress the grievances of the appellant, I heard the learned counsel for the appellant in detail in respect of the contentions raised by the appellant in the appeal before the court below. No grounds are made out to hold that the view taken by the court below is unjustifiable or illegal. The evidence on record would not justify

the acceptance of the contentions raised by the appellant. Therefore, it would not be just and proper to remand the case to the appellate court for a fresh disposal.

For the aforesaid reasons, the Regular Second Appeal is dismissed.

K.T. SANKARAN,
JUDGE.

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